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RESTRAINTS UPON THE ALIENATION AND ENJOYMENT OF ESTATES.

In the elementary works of our profession, we are told that restraints and fetters upon the transmission and enjoyment of property, are opposed to the policy and spirit of the common law. No one can proceed far in his practice before he becomes satisfied that this principle is not accepted as unqualifiedly by the courts, as he would be naturally led to suppose, from the language in which it is communicated in the text-books.

Human nature is always the same. The selfish greed of many is constantly seeking to perpetuate its sway beyond its own age and generation, while the improvidence and imbecility of others, render it apparent, that their fortunes might better be subject to any other commands than their own. Thus we are furnished with the constant tendency towards, and the constant necessity for, restraints of some kind, upon estates of every description. The practitioner will be called upon to secure and limit the transmission and enjoyment of property, according to the wishes of his clients. The general rule against restraints and fetters, which he has derived from his text-books, will afford an inadequate discharge of the responsibillity imposed upon him by their request. He should be ready to advise them to what extent their wishes can be indulged and protected by the law of the land. The imperfect manner in which, it is evident, this

duty has been discharged by conveyancers, has induced the writer to collect the authorities upon the subject, and submit some suggestions, which may possibly be of moment to the profession; the ulterior aim of the writer (which will be adverted to in the conclusion) being to ascertain, in what mode an estate, created to the use of a beneficiary, may be *best secured* to him against his own desire and inclination to dispose of it, as well as against the rights and claims of others, the enforcement of which may result in an involuntary disposition or destruction of it.

1. In order to place the subject fully before the reader, it will be necessary to allude to some of the changes, which have characterized the transmission of estates, in the law of England.

It is claimed by the old authors, that an unlimited power of alienation existed in England, in the time of the Saxons: Wright's Tenures, 154; Coke, 118 b., note a. by Thomas. It is certainly impossible to give any well-founded reason, why, in a normal state of society, property of any kind should be materially restricted in its transmission and enjoyment. But such was not the state of society under the feudal system, which succeeded the overthrow of Saxon institutions. It was unnatural and oppressive, and for that reason the reader should not be surprised at finding the law upon this subject precisely the reverse of what it should be. Accordingly we are told, that the book of fiefs contained a general ordinance, that the hand of him who wrote a deed of alienation should be stricken off: 3 Kent Com., 506.

2. A genuine feud was inalienable without the lord's consent. The tenant had only a usufructuary interest in the soil, without the power of alienation in prejudice of the lord or his own heir. Fealty and escheat remained in the lord. The latter constituted a reversionary interest in the soil, upon which rested the lord's right to object to any alienation of the estate, which might tend to his prejudice. This severity of the feudal system was diminished by the enactment of various statutes from time to time, till in the reign of Edward the First, the statute of *quia emptores*, enabled all persons except the king's tenants *in capite* to alienate their lands: 18 Ed. 1, *c.* 1.

The restraints against alienation by devise, lasted much longer. The statute of wills in the time of Henry the Eighth, enabled all persons seized in fee simple, excepting persons not *sui juris*, to devise two-thirds of their lands held in chivalry, and the whole of those held in socage: 32 & 34 Hen., 8. This power of devise was extended to all lands in the time of Charles the Second, except copy rolls, by the change of tenure by Knight's service into socage tenure: 12 Car., 2. It was not until the reign of George the First that personal property in all parts of the Kingdom was subjected to testamentary disposition: 2 Bl. Com., 493. These enabling acts were not comprehensive enough in their provisions, so far as they related to real estate, to restore to all estates the quality of unrestricted alienation which is attributed to them now. But the courts were not behind Parliament in these reforms; and they seem to have accepted the different statutes upon this subject, as sufficient justification for reversing the feudal rule against alienation, and restoring in place thereof the common law principle alluded to, which favors the transmission of real estate, and applying it to estates which were not mentioned in the enabling statutes.

3. The restraints which are now under discussion, fall naturally into two classes, *general* or *special*, and they are directed necessarily against the voluntary alienation and enjoyment of estates, or against their involuntary disposition by process of law. By general restraint, is intended such a restriction as proves co-extensive with the duration and enjoyment of the estate granted or an approximation thereto. By special restraint, the reader will understand such partial or limited abridgment of the right of alienation and enjoyment, as will leave that right not unreasonably impaired or curtailed. They will be found consisting of almost every conceivable form, such as injunctions directed against every mode of alienation, conditions, covenants and limitations, operating indirectly against the transfer and enjoyment of estates. They will be found attached to all manner of estates, freeholds, and for years, legal and equitable.

4. Their effect when directed against the voluntary alien-

ation of fee simple estates, will be first considered. It may be accepted as the undoubted result of all the authorities, both ancient and modern, that where the restraint is *general* in its operation and effect, it is void when attached to a fee simple estate. "A condition not to alien is void in a grant, release, confirmation or any other conveyance whereby a fee simple doth pass": Co. Litt., 223 *a.*; 2 Preston on Abr., 193; *Wimbish* v. *Willoughby*, Plow. 77; 1 Shep. Touch., 129; 4 Kent Com., 131; *McWilliams* v. *Nisly*, 2 S. & R., 513. It does not matter in what form it is imposed. A mere injunction "not to dispose of it for any pretext whatever," was held void: *McDougal* v. *Brown*, 21 Mo., 57. The like decision was pronounced against a condition attached to a devise, that the devisee should not alien: *Reifsnyder* v. *Hunter*, 7 Harris, Penn., 41. A restraint against alienation, until the estate which was given to several devisees, should be assigned in severalty was adjudged void, as too general and extended in its operation. There might never be such an assignment: *Hale* v. *Tufts*, 18 Pick., 455. A proviso attached to a fee, that the devisees should not sell except to each other, is void as too general in its effect: *Schermerhorn* v. *Negus*, 1 Denio, 448. A similar condition was held unobjectionable in an old case in England: *Doe* v. *Pearson*, 6 East 173; a position which has been receded from in the recent case of *Atwater* v. *Atwater*, 18 Beav. as being a departure from the law as laid down by Lord COKE. A devise in fee to go over to another, if the devisee offered to mortgage or suffer a fine or recovery, was held divested of the condition: *Ware* v. *Cann*, 10 Barn. & Cress., 433. A devise to children and their heirs as tenants in common, with a gift over to the survivor "in the event of any of them dying before having heirs of their body or making a particular disposition of his share," was declared to vest in fee, unaffected by the condition: *Greated* v. *Greated*, 26 Beav., 621.

5. Where the estate to which the condition is attached, consists of what is known as a fee-farm estate, the rule against restraints is the same. It will be remembered that the term fee simple originally indicated only the duration of an estate, without reference to the tenure by which it was held. After

the further creation of tenures in fee simple estates was prohibited by the statute *quia emptores*, the term came to represent as it now does in its popular sense, an estate to a man and his heirs, exempt from all tenure. But in those states in which this or similar statutes are not regarded as in force, an estate in fee simple held upon an annual return of rent, may still be created. And in respect to those estates it has been decided, that all general restraints against their alienation and enjoyment, are void as in other fee simple estates: *DePeyster* v. *Michael*, 6 N. Y., 497. The reasoning in the case last cited, proceeds upon the assumption that the statute of *quia emptores* was not in force in New York. It was subsequently decided that this statute was in force there: *VanRensallaer* v. *Hays*, 19 N. Y., 68. But this conclusion does not affect the reasoning and force of the opinion in *DePeyster* v. *Michael*, as applicable to such estates wherever they may exist. The right of the grantor to an annual rent in a fee farm estate, is not such an interest in the land as will sustain the imposition of of restraints against its alienation and enjoyment. The right to the rent, or of entry for non-payment of rent, does not amount to an estate in reversion, or an actual estate of any kind: 4 Kent Com., 353; *DePeyster* v. *Michael*, 6 N. Y., 497; *Payn* v. *Beal*, 4 Denio, 405.

6. In relation to estates tail, the same rule may be said to prevail against restraints, which obtains in fee simple estates: *King* v. *Bushell*, Amb., 379. It is true that in fee tail estates the grantor has a reversion or fee simple expectant upon the estate tail, a continuing estate in the soil, upon which the right to fetter and restrain the alienation of real estates, has been rested by some: *DePeyster* v. *Michael*, 6 N. Y., 497. But this distinction between fee simple and fee tail estates has not been sufficient to induce a different rule. "No condition or limitation, be it by act executed or by limitation of an use or by devise in a last will, can bar tenant in tail, from aliening by common recovery:" *Mildmay's Case*, 6 Coke R., 40; *Sanday's Case*, 9 Co. Rep., 128. There was nothing objectionable in a condition attached to an estate tail, that the tenant in tail should not alien by deed, for this was prohibited by the statute *de donis*:

Westminster 2, c. 1. But a common recovery was a method of alienation which rose after the passage of this statute; and it became a settled rule, that the tenant in tail could not be restrained in any manner from barring the entail by this method of transfer: *Mary Partington's Case*, 10 Co. R., 39; *Fay* v. *Hinde*, Cro. Jac., 697; *Taylor* v. *Horde*, 1 Burrow, 84. It was also laid down by the old authors, that a condition attached to an estate tail that the tenant in tail should not make a lease for his own life was void, as repugnant to the nature of the estate granted: Co. Litt., 223 b.; Roll. Abr., 418, Cond.

7. Conditions which operate as restrictions upon the use and enjoyment of fee simple estates, are void when arbitrary, unreasonable or inconsistent with the nature of the estates granted, as, for instance, that the feoffee shall not commit waste: Brooke's Abr. Cond. 57, fol. 149; or that he should not receive the profits: 1 Coke, 206 b.; *Moore* v. *Savill*, 2 Leon. 132; So also, a restraint in a devise for charitable purposes, that the rents should not be raised, was held void as unreasonable: *Att'y Gen.* v. *Master of Cath Hall*, Jacobs, 381. A clause in a devise directing that a certain portion of the land given should remain inseparably attached to the residue, and be held and used for fuel only, was pronounced invalid: *Smith* v. *Clark*, 10 Md., 186. A devise to the testator's children, "in case they continued to inhabit the town of H., otherwise not," was held to vest free of the condition as unreasonable and repugnant: *Newkirk* v. *Newkirk*, 2 Caines, 345. To this class may be added the case of *Overbaugh* v. *Patrei*, 8 Barb., 28, in which a condition attached to a fee simple estate, requiring the grantor to pay one-fourth of all the purchase-money which he might receive in any subsequent conveyance, was declared void.

8. The objection to *general* restraints against alienation, has usually been urged in connection with estates in fee. The ground of the objections as already intimated, is more pointedly set out by Lord Coke. "For it is absurd and repugnant to reason that he that hath no possibility to have the land revert to him, should restrain his feoffee in fee simple of all powers to alien:" Co. Litt., 223, a. It was also objected that where the restraint was general, being coextensive with the estate, it would con-

travene the rule against perpetuities. Now, in respect to life estates, neither of these objections have any foundation. After the life estate the grantor still retains an estate in the land, and may be supposed not indifferent about its alienation and enjoyment. As a restriction, when attached to a life estate, it must necessarily be discharged within a period of time falling short of any violation of the rule against perpetuities. Accordingly we find abundance of authorities in support of restraints against the alienation of life estates, as being neither opposed to the policy of the law nor repugnant to the nature of the estate to which they are attached: 1 Co. Inst., 204, 223 b.; Platt on Cov., 404; *Parry* v. *Harbart*, 1 Dyer, 45 b.; *Jackson* v. *Silvernail*, 15 John 278; 2 Cruise Dig., 7–8; *Mc Williams* v. *Nisly*, 2 S. & R., 307.

Restraints in the nature of fines upon alienation, have been held good in leases for life: *Jackson* v. *Groat*, 7 Cow., 285; *Livingston* v. *Stickly*, 7 Hill, 253.

The weight of authority and reason, very probably concur in allowing such restrictions attached to life estates, especially when directed against voluntary alienation. But there is sufficient authority opposed to the position, to render it extremely hazardous for any conveyancer to rely upon it with any safety or certainty: *Rocheford* v. *Hackman*, 9 Hare, 475; *Dick* v. *Pitchford*, 1 Dev. & Bat. Eq., 480; *Brandon* v. *Robinson*, 18 Ves., 429; *McIlvain* v. *Smith*, 42 Mo., 45.

9. There seems to be no objection to general restraints against the alienation and assignment of estates for years. It is quite common to introduce them into leases for years, in the shape of covenants and conditions: Platt on Cov., 404, Taylor, Land. & T., 402; *Church* v. *Brown*, 15 Ves., 259.

10. Thus far, only restraints against voluntary alienation have been considered. It is equally well settled, that all *general* restraints against involuntary alienation are in like manner void, when annexed to fee simple estates. These restraints usually take the form of attempted protection against the debts and liabilities of the beneficiary. It has been decided, that notwithstanding a restriction against transfer and assignment, the grantee's interest will pass to his assignee in bankruptcy:

Brandon v. *Robinson*, 18 Ves., 429. A restriction, that the estate shall not be subject to conveyance or attachment is void, as against the policy of the law: *Blackstone Bank* v. *Davis*, 21 Pick., 42. The same is true of a clause exempting the estate from liability for debts: *Grover* v. *Dolphin*, 1 Sim., 66.

11. Some authorities in this country have gone the length of sustaining provisions in trust estates, exempting the interest of the beneficiaries from all debts and liabilities, where the object of the trust did not extend beyond their maintenance and support: *Fisher* v. *Taylor*, 2 Rawle, 33; *Vaux* v. *Parker*, 7 W. & S., 19; *Norris* v. *Johnson*, 5 Barr, 287; *Holdship* v. *Patterson*, 7 Watts, 547; *Braman* v. *Stiles*, 2 Pick., 440; 1 Wallace, Jr., 119 note; *Ashurst* v. *Given*, 5 W. & S., 323; *Pope* v. *Elliot*, 8 B. Mon., 56; *Perkins* v. *Dickinson*, 3 Gratt., 325; *Eyrick* v. *Eyrick*, 13 Penn., 491. Restrictions of this kind are usually attached to life estates; but to whatever estate they may be attached, they necessarily fall short of violating the law against perpetuities, being directed against the debts and liabilities of the beneficiary, and ceasing with his life. But such exemptions are said to be opposed to the policy of the law, which does not favor the enjoyment of estates exempt from burdens and incidents of property. It is urged, that creditors are entitled to every right of property which their debtor may possess or enjoy. These decisions cited by us, are exceptional. They meet with no support in the chancery law of England: *Green* v. *Spicer*, 1 Rus. & Myl., 395; *Ripon* v. *Norton*, 2 Beav., 63; *Snowdon* v. *Dales*, 6 Sim., 524; *Younghusband* v. *Gibson*, 1 Coll., 400; *Willis* v. *Hiscox*, 4 Myl. & Cr., 197; and the weight of authority is against them in this country: *Hallett* v. *Thomson*, 5 Paige, 385; *Rider* v. *Mason*, 4 Sandf. Ch., 351; *McIlvaine* v. *Smith*, 42 Mo., 45; *Hammersly* v. *Smith*, 4 Whart., 126; *Nickel* v. *Hanley*, 10 Gratt., 336; *Nicholson* v. *Miller*, w. Gratt., 334, 343. In some states there are statutes which authorize the creation of such trusts: 1 Rev. Stat. N. Y., 1836, p. 729, § 57.

12. The right in a grantor to exempt the interest of a beneficiary of a trust, from the effects of involuntary alienation, has been maintained in a class of cases which will be found

resting upon principles peculiar to the law governing the administration of trusts. It is seldom the estate of the beneficiary can be reached by creditors, except in a court of equity; and it seems to be an established principle prevailing there, that any restraint against voluntary or involuntary alienation, will be approved wherever an opposite conclusion would involve a destruction of the trust.

Wherever the interest of a beneficiary is so connected with the interests of other beneficiaries in the same trust, that a sale of it would impair those other interests or estates, a restriction against any form of alienation will be sustained: *Scott and wife* v. *Gibbons*, 5 Munf., 86; *Johnson* v. *Zane*, 11 Gratt., 552; *Markham* v. *Garrant*, 4 Leigh, 274; *Perkins* v. *Dickinson*, 3 Gratt., 335; *Hill and wife* v. *McRae*, 27 Ala., 175: 15 Eng. Ch., 81, 86, 87. But where the interest of a beneficiary can be separated without injury to the remaining interests, it is against the policy of the law that it should be enjoyed, exempt from the claims of creditors. A court of equity will enforce their claims against it, by sale or decree for an account: *Rugby* v. *Robinson*, 10 Ala., 702; *Nickel* v. *Handley*, 10 Gratt., 336; *Roans* v. *Archer*, 4 Leigh, 550; *Riton* v. *Norton*, 2 Beav., 63; *Page* v. *Way*, 3 Beav., 20.

The case of *Grissom* v. *Hill*, 17 Ark., 483, presents an interesting point, bearing upon the subject under consideration. A restriction was attached to a trust of certain land, given to a church for religious purposes, to the effect that it should not be sold or incumbered. It was levied upon and sold under process of law. The court held, that if the sale tended to defeat or impair the trust, a bill would lie to set it aside.

(*To be Continued.*)

RECENT AMERICAN DECISIONS.

Louisville Chancery Court, Kentucky.

FULTON ET AL., *v.* FARLEY ET AL.

Pending an action relating to church property, the Louisville Chancery Court put the church into the possession of the marshal and made a decree, from which an appeal was taken. The Court of Appeals reversed the decree and remitted the record, with a mandate to the chancery to carry the opinion